IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE A.K.BASHEER

WEDNESDAY, THE 14TH MARCH 2007 / 23RD PHALGUNA 1928

WP(C).No. 30351 of 2003(L)

PETITIONER:

SURESH BABU.P.G.,
NO.14401989 EX NK(OPR),
PERMANENTLY RESIDING AT PANDARACHETHU HOUSE,
KOLLAKKADAVU PO, ALLEPPEY.

BY ADV. DR.K.P.KYLASANATHA PILLAY
SMT.SREEDEVI KYLASANATH

RESPONDENTS:
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1. **UNION OF INDIA REP.BY THE**
   SECRETARY, MINISTRY OF DEFENCE,
   CENTRAL SECRETARIAT, NEW DELHI.

2. **COMMANDING OFFICER,**
   TOPKHABA ABHILEKH-ARTILERY RECORDS,
   NASIK ROAD CAMP - 422 102.

3. **COMMANDING OFFICER,**
   172,FIELD REGIMENT.

BY ADV. SRI.C.B.SREEKUMAR, ADDL.CGSC
SRI.C.B.SREEKUMAR, ADDL.CGSC
SRI.A.JAYASANKAR, ADDL.CGSC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 14 / 03 / 2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C) NO. 30351/2003

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE COMMUNICATION DT.26.1.02 ISSUED BY 3RD RESPONDENT.

EXT.P2:- COPY OF THE COMMUNICATION NO. 13/9/LMC/SUD/135/RA-6 DT.28.11.02.

EXT.P3:- COPY OF THE NOTICE DT.2.11.03 ISSUED BY 3RD RESPONDENT, TO THE PETITIONER.

EXT.P4:- COPY OF THE REPRESENTATION DT.7.3.03 SUBMITTED BY THE PETITIONER BEFORE THE 3RD RESPONDENT.

EXT.P5:- COPY OF THE JUDGMENT DT.26.3.03 IN OP. NO.8634/03.

EXT.P6:- COPY OF THE ORDER NO.14401989/LC/28/NEI-6(A) DT.2.8.03 ISSUED BY THE 2ND RESPONDENT.

RESPONDENTS EXHIBITS

EXT.R1:-COPY OF THE ARMY ORDER NO.46/80 DT. NIL.

EXT.R2:- COPY OF THE COMMON ORDER IN WP(C) NOS.22800 AND 20962 /2002 DT.3.1.03.

/TRUE COPY/

tss

A.K. Basheer, J.

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W.P(C) No. 30351 of 2003-L

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Dated this the 14th day of March, 2007.

J U D G M E N T

Is Ext.P6 order issued by respondent No.2 discharging the petitioner from Army service legally valid and sustainable?

2. A brief reference to the essential facts may necessary to answer the above question.

3. Petitioner was enrolled in the Army on September 25, 1989 as Ex Naik (Operator Radio) in the Regiment of Artillery. Petitioner was serving in the Army till April 30, 2003, the date of his discharge as Naik (Operator Radio). It is the admitted position that petitioner had suffered an injury on his leg while he was on duty at CMP Post, Manali. According to the petitioner a stone weighing around 30 kg. had fallen on his leg while he was carrying it. He was treated in the hospital as an inpatient for 4 weeks and was discharged thereafter. But his leg was put under plaster cast again for a further period of 8 weeks. After his discharge from the hospital, he had reported at the unit for duty in December 2001.

4. It is admitted by the respondents that petitioner was downgraded to low medical category S1HIA3(T-12)P1E1 with effect from December 10, 2001 for the disease "fracture medial malleolus (Right) Ankle". The Medical Board had reviewed the condition of the petitioner in 2 spells. Consequently petitioner was placed in permanent low medical category S1H1A2P1E1 with effect from August 17, 2002 for 2 years because of the injury mentioned above. According to the respondents petitioner had expressed his willingness to continue in service despite his categorisation in permanent low

medical category referred to above. It is the case of the respondents that at that time the holding strength of the trade to which the petitioner belonged was within the sanctioned limit and it was therefore that he was retained in service with "sheltered appointment under the existing rules".

5. However on January 2, 2003 petitioner was served with Ext.P3 notice directing him to show cause why his retention in service should not be terminated since it was noticed that the strength in his trade had exceeded the sanctioned limit. In response to the above show cause notice, petitioner had submitted Ext.P4 explanation. Shortly after submitting the explanation, petitioner had filed OP.8634/03 before this Court praying for a direction to the respondents not discharge the petitioner unless and until his explanation was considered. By Ext.P5 judgment dated March 26, 2003 this Court issued a direction to the respondents to consider the explanation mentioned above and to take an appropriate decision in the matter. Thereafter Ext.P6 order was passed by respondent No.2 discharging the petitioner from service. Petitioner has preferred this writ petition challenging Ext.P6 order of discharge.

6. The prayer in this writ petition is to issue a writ of certiorari to quash Exts.P3 and P6. There is a further prayer to issue a writ of mandamus or such other writ or direction to the respondents to reinstate the petitioner in the post of Radio Operator with effect from the date of discharge and also to shift him to some other post with same pay scale and service benefits or to keep him on a supernumerary post. He further prays for a declaration that he is entitled to continue in

military service.

7. In the counter affidavit it is admitted that petitioner had suffered the injury in question while he was on duty. Petitioner had not disputed the fact that he had been placed under permanent low medical category because of the injury sustained by him. However it is the contention of the petitioner that the respondents were not justified to discharge the petitioner because of the disability suffered by him.

8. In this context petitioner seeks protection under the provisions contained in Persons with Disabilities (Equal Opportunities, Protection of rights and Full Participation) Act 1995 (for short, the Act) also. Further, petitioner places heavy reliance on the opinion of the Commanding Officer of the Regiment concerned and the Court of Enquiry Proceedings. Ext.P1 is stated to be the true photo copy of the proceedings in which it is stated that petitioner had suffered the injury on his right ankle while on “bonafide military duty”. It is further stated in Ext.P1 that the injury sustained by the petitioner was beyond his control and that no one was to be blamed. It is also stated that injury was attributable to military service. Learned counsel submits that the nature of the injury being such, it is cruel on the part of the respondents to discharge him from service and that too on the ground that the strength in the category of Operator Radio had exceeded its sanctioned strength. Petitioner has to look after his family consisting of his wife and two children and it will be impossible for him to get any other employment at this stage. It is contended by the petitioner that the respondent could have accommodated him in any other suitable post till he attains the age of superannuation.

9. Undoubtedly the contentions raised by the petitioner as noticed above are not without force. But nothing has been brought to my notice to show that the provisions contained under Act 1995 are applicable to the military establishment. It is true that petitioner had to be discharged because of the unfortunate injury sustained by him in the course of his service.

10. But the respondents have given a valid explanation that petitioner's discharge had become inevitable in view of the instructions contained in Army Order 46/80. It is contended that petitioner's disability was not a battle casualty; nor was he a War Wounded Personality. Therefore his case could not have been treated as one meriting retention in service. It is also pointed out by the respondents that the following pensionary/terminal benefits had been disbursed to the petitioner on his discharge from service:

Disability Pension	- Rs.775/ p.m., excluding DA.
Service Element	- Rs.1,163/ p.m. excluding DA.
DCRG	- Rs.54,339/-
Capitalised value of commutation of pension	- Rs.1,95,260/-
Armed Forces Personnel P.F.Accrued balance	- Rs.2,04,613/-
Army Group Insurance Maturity benefits	- Rs.36,689/-
Final Settlement of Accounts	- Rs.23,321/-

It is true that the respondents have not given any details as regards the sanctioned strength or the number of surplus hands in the category of Operator Radio. But in the peculiar facts and circumstances of the case

I am not satisfied that the reliefs prayed for by the petitioner in this writ petition can be granted. In the absence of any allegation of malafides I am of the view that the action of the respondents in issuing Ext.P6 order need not be interfered with. Therefore the writ petition fails and it is accordingly dismissed.

an. A.**K. Basheer, Judge.**